Supreme Court, U.S.
FILED
FEB 14 1994
OFFICE OF THE CLERK

(4)

No. 93-1098

In the
Supreme Court of the United States
October Term, 1993

OUTBOARD MARINE CORPORATION,
Petitioner,

v.

DAVID R. WOLTERING,
Administrator of the Estate
of Stacey Lee Grace,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
FIFTH DISTRICT

REPLY BRIEF RE PETITION FOR A WRIT OF CERTIORARI

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Petitioner Outboard Marine Corporation ("OMC") submits this reply brief in support of its Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth District. Respondent challenges this Court's jurisdiction over this matter on the grounds that the decision appealed from is not "final" within the meaning of 28 U.S.C. § 1257(a) because further proceedings are to take place in state court. However, this case falls squarely within a well-established exception to the finality requirement, and review by this Court is appropriate.

ARGUMENT

THIS COURT HAS JURISDICTION OVER THIS CASE BECAUSE THE FEDERAL ISSUE PRESENTED HAS BEEN FINALLY DECIDED BY THE STATE COURTS OF ILLINOIS, FURTHER REVIEW OF THE DECISION ON THE FEDERAL ISSUE IS UNLIKELY AND FAILURE TO REVIEW THIS DECISION WILL SERIOUSLY ERODE FEDERAL POLICY.

A. This Court Recognizes an Exception to the Rule Requiring Finality Where State Courts Have Finally Decided a Federal Issue, Further Federal Review is Unlikely and The State Court's Decision Will Seriously Erode Federal Policy.

This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1257(a), which provides that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . ." The finality prerequisite is intended to preclude piecemeal review of state court judgments, ensure that federal courts render decision only where a case or controversy is present and minimize federal intrusion into the

operation of state courts. *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 158 (1973).

Respondent contends the decision from which petitioner appeals is not a final judgment or decree because the Illinois Court of Appeals (and, by denying review, the Illinois Supreme Court) reversed the order granting partial summary judgment and remanded for further proceedings. This Court has long recognized, however, that the mere pendency of further state court proceedings does not preclude a finding that the state court judgment is final. Finality is not to be determined mechanically, but pragmatically, accounting for significant policy concerns implicated by the particular decision at issue. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 486 (1975).

Cox set forth four "exceptions" to the rule of finality long recognized by this Court. Of particular significance here is the fourth exception:

> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously

> erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Cox, 420 U.S. at 482-83. *See also Fort Wayne Books v. Indiana*, 489 U.S. 46 (1989); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963); *Construction Laborers v. Curry*, 371 U.S. 542 (1963). This case falls squarely within that exception.

B. This Case Falls Within the Fourth *Cox* Exception to the Rule Requiring Finality.

Cox recognizes that this Court has jurisdiction over a state court decision, despite further state court action to come, if (1) the state courts have finally decided the federal issue, (2) the petitioner might prevail on nonfederal grounds in further state court actions and thus render review of the federal issue unnecessary, (3) reversal of the state court decision would preclude further litigation on the cause of action, and (4) refusing review would seriously erode federal policy. This case meets each criterion.

First, the Illinois courts have fully decided the federal issue of whether federal maritime law applies to this action. The trial court determined federal maritime law did apply, and granted OMC's motion for summary judgment. The Illinois Court of Appeals erroneously reached a different conclusion and reversed the trial court, and the Illinois Supreme Court denied OMC leave to appeal the Court of Appeals' decision. There is no remaining avenue for review of the federal issue in the Illinois judicial system.

Second, subsequent state court proceedings may preclude later review of the federal issue. Further state proceedings are pending. The Court of Appeals reversed an order granting summary judgment and remanded this case for continued litigation. OMC could prevail in the state court action on nonfederal grounds. For instance, OMC might win on the merits of respondent's product liability claim, which the Court of Appeals has incorrectly decided is governed by state law. If OMC prevails on the merits, OMC will not need, or even be permitted, to seek further review of the Court of Appeals' erroneous interpretation of the scope of federal maritime law. The Court of Appeals decision would thus remain in effect because additional review would be not only unnecessary, but unavailable.

Third, this Court can preclude further litigation on this cause of action by reversing the Court of Appeals. The trial court granted summary judgment on respondent's wrongful death cause of action seeking loss of society damages. If this Court reverses the Court of Appeals, it will in essence reinstate that summary judgment, barring additional litigation on that cause of action.

Finally, refusing to review the Court of Appeals' decision would seriously erode the significant federal policy interest in promoting uniform application of maritime law across the country. The value of uniform maritime law is substantial, and the principle of uniformity is constitutionally based. *Moragne v. States Marine Lines*, 398 U.S. 375, 402 (1970), *quoting The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1874). As the Petition and the Brief of *Amicus Curiae* demonstrate, the Court of Appeals' decision undermines this principle by promoting a fact-dependent method of determining the applicability of maritime law. The very existence of this anomalous state court decision, which flies in the face of

this Court's previous decisions and erodes the federal policy of uniformity, justifies the exercise of this Court's jurisdiction pursuant to 28 U.S.C. § 1257. *See Cox*, 420 U.S. at 485-86 (failure to address important federal question would harm federal interest in freedom of the press); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974) (state court decision created unsettled constitutional posture that could harm federal interest in freedom of the press).

Two recent cases establish that the fourth *Cox* exception is appropriately applied in this case. In *Fort Wayne Books*, a consolidated case involving prosecutions for selling obscene materials, the petitioners were charged with violating the Indiana Racketeer Influenced and Corrupt Organizations Act and challenged this application of the Act on constitutional grounds. The Indiana Supreme Court in one case upheld this application of the Act and in another case refused to review a Court of Appeals decision finding the charge constitutional. This Court found jurisdiction:

> This case clearly satisfies the first sentence of [the fourth *Cox* exception]: petitioner could well prevail on nonfederal grounds at a subsequent trial, and reversal of the Indiana Court of Appeals holding would bar further prosecution on the RICO counts at issue here. Thus, the only debatable question is whether a refusal to grant immediate review of petitioner's claims "might seriously erode federal policy." . . . Resolution of this important issue of the possible limits the First Amendment places on state and federal efforts to control organized crime should not remain in doubt.

Fort Wayne Books, 489 U.S. at 55-56.

This Court also found jurisdiction in *Goodyear Atomic*, in which the state of Ohio attempted to subject the operator of a federal nuclear production facility to state workers' compensation regulations. Both the Ohio Court of Appeals and the Ohio Supreme Court reached the conclusion that federal law did not preempt application of state workplace safety regulations unrelated to radiation hazards. This Court independently considered its jurisdiction, and relying upon *Cox*, concluded:

> We believe the present case falls within this fourth category. The federal question whether the additional workers' compensation award is barred by federal law has been finally determined by the Ohio Supreme Court, and a reversal of the Ohio Supreme Court's holding would preclude any further proceedings. In addition, even if appellant prevails before the Industrial Commission on nonfederal grounds, for example, if the Commission determines that there was no violation of the state safety regulation, the unreviewed decision of the Ohio Supreme Court might seriously erode federal policy in the area of nuclear production. The federal pre-emption analysis of the Ohio court sanctions direct state regulation of nonradiological hazards at the . . . only nuclear facility producing nuclear fuel for the Navy's nuclear fleet. Moreover, the decision has important implications for the regulation of federally owned nuclear production facilities in other States.

Goodyear Atomic, 486 U.S. at 179-80.

Similarly, failure to review the Illinois Court of Appeals' decision in this case has ramifications far beyond

the boundaries of Illinois. The Court of Appeals' decision raises the specter of every state court taking off on a fact-bound determination of the applicability of federal maritime law, fragmenting this body of law at a time when this Court has dictated uniformity to be a primary concern. Such a decision would fly in the face of this Court's avowed pragmatic approach to determining finality. *Cox*, 420 U.S. at 486.

C. This Court May Exercise Jurisdiction Even Though Subsequent Review of the Federal Issue is Not Impossible.

Respondent contends that the fourth *Cox* exception "applies only where subsequent review is impossible, regardless of the ultimate outcome of the case," and "if petitioner does not prevail in the subsequent proceedings, it will have the opportunity to seek review on the federal issue." Respondent's Brief in Opposition at 4. However, this Court has consistently granted certiorari in cases despite a theoretical possibility of further review. *See Curry*, 371 U.S. at 550 (explicitly acknowledging the possibility that, absent immediate review by this Court, the petitioner might seek to relitigate the federal issue before the National Labor Relations Board); *Langdeau*, 371 U.S. at 558 (this Court granted immediate review of issue of venue permissible under federal statute; absent immediate review, petitioners could have sought relief after conviction).[1]

[1] In addition, neither case respondent cites supports this proposition. *Costarelli v. Massachusetts*, 421 U.S. 193 (1975), was a case in which the plaintiff never attempted to seek review in the state appellate courts, and this Court based its decision upon the existence of additional avenues for review in state court. This Court did

Although further review of the Court of Appeals' decision in this case is theoretically possible, it is extremely unlikely this Court will ever have another chance to rectify this abuse of federal maritime precedents. The unlikelihood and impracticality of subsequent review renders petitioner's rights under federal maritime law illusory, and thus immediate review is warranted. *Curry*, 371 U.S. at 550.

In addition, even if petitioner can successfully seek review in the future, the Court of Appeals' decision will remain valid in the interim. It will continue to erode the federal policy of uniform maritime law for as long as it takes to litigate this case in state court and seek subsequent review in this Court. As OMC's Petition demonstrated, other plaintiffs are already seizing upon this decision as a means of undermining the application of maritime law. *See* Petition for a Writ of Certiorari at 19. Even temporary disruption of federal interests is a significant threat and is not to be tolerated. *Curry*, 371 U.S. at 550.

D. The Possibility That Another Federal Law-Based Argument May Be Raised in Future State Court Proceedings Does Not Preclude Jurisdiction Under the Fourth *Cox* Exception.

Respondent argues that the possibility that preemption under the Federal Boat Safety Act may be raised as a

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not discuss the existence of federal review subsequent to trial. *Costarelli*, 421 U.S. at 197. Respondent also cites *Cox*, 420 U.S. at 482, but that page contains no discussion of the impossibility of further review, merely an analysis of the *North Dakota Board of Pharmacy* case and the first sentence of exception number four.

defense to plaintiff's claims of negligent design precludes this Court from assuming jurisdiction under the fourth exception to *Cox*. This argument ignores the compelling policy reasons underlying the fourth exception, and misconstrues the case law.

The fourth exception to *Cox* is predicated upon the fundamental necessity that this Court be able to review a case in which a state court decision threatens serious erosion of federal policy if immediate review is not available, and in which there is every likelihood that the Court will have no other opportunity to address and remedy the error of the appellate court. In this case, the Appellate Court decision threatens to erode the uniformity of federal maritime law during any interim period in which it stands uncorrected. The significant likelihood that if review is denied now, the Appellate Court decision will *never* reach this Court means that the erosion may well continue unabated. These facts place this case squarely within the letter and spirit of the fourth exception to *Cox*. The possibility that an unrelated federal issue might arise in later proceedings if summary judgment is not reinstated does not diminish the importance of the policy considerations that call for immediate and certain review of the Appellate Court decision.

The cases cited by respondent do not require a different result. *ASARCO, Inc. v. Kadish*, 490 U.S. 607, 613 (1989), involved the first and second exceptions to *Cox*, not the fourth exception. The first and second exceptions are not premised upon concerns over erosion of federal policy but instead arise in circumstances where the subsequent proceedings "have little substance, their outcome is certain, or they are wholly unrelated to the federal question." *Cox*, 420 U.S. at 478.

While *Flynt v. Ohio*, 451 U.S. 617 (1981), the other case cited by respondent, observes that "most" of the cases falling within the four exceptions left no other federal issues to be resolved, this Court has never declared the absence of other federal issues to be an essential prerequisite to accepting review under the fourth exception to *Cox*. Indeed, as is evident from both the majority and dissenting opinions, the principal ground for the decision to dismiss the writ in *Flynt* was the Court's conclusion that "there is no identifiable federal policy that will suffer if the state criminal proceeding goes forward." 451 U.S. at 622. In this case, by contrast, there is an identifiable federal policy -- the uniformity of maritime law -- that will suffer if the erroneous decision of the Appellate Court is not addressed now.

CONCLUSION

This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). Although the Illinois Court of Appeals decision contemplates further proceedings in state court, that decision is still final for jurisdictional purposes. The Illinois courts have finally decided the federal issue of whether maritime law applies to this cause of action. Pending state proceedings might render further review of that decision unnecessary, and failure to review the decision will seriously erode the federal policy of uniform application of maritime law. Consequently, this decision is reviewable under the fourth *Cox* exception to the rule requiring finality, and this Court should grant certiorari to correct the Illinois Court of Appeals' grievous misinterpretation of the scope of maritime law.

Respectfully submitted,

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